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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|----------------------|---|----------------------|
| LIONEL SIMS, |) | |
| |) | |
| Appellant-Defendant, |) | |
| |) | |
| vs. |) | No. 45A05-0602-CR-75 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Plaintiff. |) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0412-MR-17

October 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Lionel Sims (“Sims”) appeals his conviction for Voluntary Manslaughter, a Class A felony.¹ We affirm.

Issues

Sims presents two issues for review:

- I. Whether the trial court properly admitted statements by alleged co-conspirators; and
- II. Whether the trial court properly admitted evidence of Sims’ criminal history.

Facts and Procedural History

On the evening of December 9, 2004, Sims, Tremayne Chapman (“Chapman”), Mitchell Armstrong (“Armstrong”), Paula Carson (“Carson”), Tadora Merritt (“Merritt”), Thomas Scott (“Scott”), and Andre Paige (“Paige”) were drinking beer and tequila and playing cards at Carson’s apartment in Gary, Indiana. Carson’s teenaged cousin, Charlotte Murray (“Murray”), was babysitting several children in the living room during the card games. After the group had been together a couple of hours, Chapman told Carson that Paige claimed to have “twenty pounds of drugs coming in.” (Tr. 174.) Because of this, Chapman concluded that Paige “was the police.” (Tr. 174.) Carson asked the men to leave her apartment.

Chapman, Paige, Sims and Armstrong left the apartment together. A few minutes later, Armstrong knocked at the back door. When he was allowed back into the apartment, he began to rummage through a drawer, saying “I need a knife, I’m fitting [sic] to cut this

dude, I need a knife.” (Tr. 95.) Merritt and Carson followed Armstrong outside, and saw Chapman and Sims “stomping on [Paige] and kicking him.” (Tr. 97.) Paige was lying on the ground, not moving. Merritt heard Chapman say, “This nigger got to die, this m-----f----- got to die.” (Tr. 98.) Inside the apartment, Murray heard Sims repeatedly demanding to know, in an angry voice, whether Paige “was the police.” (Tr. 312.) At some point during the beating, Sims’ twin brother, Donnie Sims (“Donnie”) arrived.

Merritt and Carson turned to go back into the apartment, but Chapman demanded, “everybody got to do something, you all got to stay here and help us.” (Tr. 99.) Chapman directed Scott to go get his van, adding “you going to take us to get rid of this body.” (Tr. 178.) Scott complied, and Sims, Donnie and Chapman then dragged Paige into the van and placed him on the floor. Merritt, Carson, Sims, Donnie, Chapman and Armstrong got into the van. Scott drove to a wet, wooded area near County Line Road in Gary. During the drive, Chapman continued to scream, “this nigger got to die, he got to die.” (Tr. 103.) When Paige moved slightly, Chapman stomped on his head.

When Scott parked the van, Sims, Donnie and Chapman dragged Paige out and, together with Armstrong, began kicking and hitting Paige again. Chapman demanded that Merritt, Carson and Scott get out of the van because “everybody got to do something.” (Tr. 110.) The latter three then took turns getting out of the van and striking one or two blows each. Armstrong stabbed Paige with a steak knife. The group left Paige face down in water and drove away in the van.

¹ Ind. Code § 35-42-1-3.

Paige died, most likely due to hemorrhaging in his brain but possibly due to drowning. The State initially charged each of the participants in the beating with murder. However, Thomas, Merritt and Carson agreed to plead guilty to lesser charges and testify against the others. When Sims was brought to trial on November 14, 2005, Merritt and Carson testified against him. Sims was convicted of voluntary manslaughter and sentenced to thirty years imprisonment. He now appeals.

Discussion and Decision

I. Admission of Statements of Co-conspirators

At Sims' trial, the State elicited evidence of statements made by Chapman and Armstrong, who did not testify. Sims lodged a contemporaneous hearsay objection to two statements elicited during Merritt's testimony: (1) that Chapman admitted he did not know Paige and (2) that Armstrong requested a knife with which to kill Paige. The State argued that such evidence was being offered pursuant to the co-conspirator exception to the hearsay rule, and the trial court overruled Sims' objection. Sims now contends that the State failed to establish the existence of a conspiracy to kill Paige, and that the trial court should have granted his motion, at the end of the State's case-in-chief, to strike all hearsay testimony of statements by unavailable alleged co-conspirators.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). A co-conspirator's statement is not hearsay, if the statement is one "by a co-conspirator of a party during the course and in furtherance of the conspiracy." Evid. R. 801(d)(2)(E). However, the State must prove that there is "independent evidence"

of the conspiracy before the statements will be admissible as non-hearsay under Rule 801(d)(2)(E). Lander v. State, 762 N.E.2d 1208, 1213 (Ind. 2002). This means that the State must show (1) the existence of a conspiracy between the declarant and the party against whom the statement is offered and (2) the statement was made in the course and in furtherance of this conspiracy. Id.

Here, the State did not offer any independent evidence of a conspiracy prior to its eliciting hearsay testimony that Armstrong said he needed a knife to kill Paige. Accordingly, this statement should have been ruled inadmissible as hearsay. Nevertheless, the erroneous admission of evidence will not result in the reversal of a conviction if the error is harmless. See Ind. Trial Rule 61. Harmless error is defined as an error that does not “affect the substantial rights of a party.” Lander, 762 N.E.2d at 1213.

Following Merritt’s testimony that Armstrong said he needed a knife to kill Paige, Murray and Carson testified to the same, without objection from Sims. Murray also testified to her first-hand observation, “I see [Armstrong] reach into the sink and grab the knife.” (Tr. 311.) Finally, Sims testified in pertinent part, “Mitchell Armstrong comes up and says, I’m going to get a knife and he runs back in the house.” (Tr. 426.) Accordingly, we do not find that the erroneous admission of Armstrong’s hearsay statement during Merritt’s testimony prejudiced Sims’ substantial rights. Moreover, Sims has not explained, nor have we discerned, how testimony that Chapman was not previously acquainted with Paige incriminates Sims or is prejudicial to him. The improper admission of hearsay evidence was harmless error.

II. Evidence of Prior Convictions

Sims contends that the trial court erred in admitting evidence of his prior criminal history, consisting of two convictions for battery and one conviction for assisting a criminal.

The admission of evidence of other crimes is restrained by Indiana Rule of Evidence 404(b), which provides in relevant part as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

This rule is designed to prevent the State from punishing people for their character. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003). Evidence of extrinsic offenses poses the danger that the jury will convict the defendant because he is a person of bad character generally, or has a tendency to commit crimes. Id. The rationale for the prohibition against bad act and character evidence is “predicated upon our fundamental precept that every defendant should only be required to defend against the specific charges filed.” Oldham v. State, 779 N.E.2d 1162, 1173 (Ind. Ct. App. 2002), trans. denied.

To decide whether character evidence is admissible under Evidence Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs or acts is relevant to a matter at issue other than the person’s propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403. Id.

The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission and its ruling will be reviewed only for an

abuse of discretion. Larry v. State, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999). A decision by the trial court to admit evidence will be reversed only upon a showing of a manifest abuse of discretion that resulted in the denial of a fair trial. Id. at 80.

Additionally, otherwise inadmissible evidence may become admissible where the defendant “opens the door” to questioning on that evidence. Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000). The evidence relied upon to “open the door” must leave the trier of fact with a false or misleading impression of the facts related. Id.

Here, Sims testified that the prosecutor never came to him and asked his side of the story. He further testified that she went to the other participants, “took their side” and offered plea agreements. (Tr. 432.) According to Sims, the prosecutor was “just trying to get a conviction off him” and ignored evidence that Scott, Merritt and Carson were “the ones who actually did it.” (Tr. 432-33.) Sims thus fostered the impression that the prosecutor was engaging in selective prosecution.

The trial court concluded that Sims “opened the door” to the admissibility of his prior criminal history by implying that there was no just reason why he had not been offered a plea agreement as had some of the other participants. We agree with the trial court’s reasoning. The evidence of Sims’ prior convictions was not introduced solely to prove the forbidden inference of Sims’ propensity to commit crime. Rather, it was admissible to challenge the impression that the prosecutor was prejudiced against Sims and engaging in selective prosecution. The trial court did not abuse its discretion in admitting the challenged evidence.

Conclusion

Sims has demonstrated no error in the admission of evidence affecting his substantial rights.

Affirmed.

RILEY, J., and MAY, J., concur.